A

Chi Liung Holdings Sdn Bhd v L & T Realty Sdn Bhd & Anor

COURT OF APPEAL (KUALA LUMPUR) — CIVIL APPEAL NO B-02-23 OF 1995

ZAKARIA YATIM FCJ, VC GEORGE AND MAHADEV SHANKAR JJCA

B 27 DECEMBER 1999

Land Law *— Sale of land — Auction — Application to set aside order for sale — Appellant's land sold by public auction — Extention of time granted without giving notice to appellant — Whether failure to give notice fatal to sale*

C The appellant appealed for an order that the sale of land held under Grant 13138, Lot No 6891 Mukim of Kelang ('the land') — by way of a public auction — to the respondent be set aside. The appellant also applied that the order of the senior assistant registrar granting the respondent an extension of the time of 90 days to pay the balance of the purchase price of the land be set aside. It was contended that the D appellant was not notified of the application by the respondent to extend time.

Held, dismissing the appeal:

E The appellant was duly informed or aware of the proceedings for sale of the land. The appellant also knew the terms of the conditions of sale. Therefore, the extension of time for 90 days to pay the balance of the purchase price was granted in accordance with the terms of cl 6 of the conditions of sale. There was no alteration or variation of the conditions of sale, thus failure of the respondent to give draft F notice of the application to extend time was not fatal to the sale (see pp 174F–H, 176C); *Malayan United Finance Bhd, Johore Bahru v Liew Yet Lan* [1990] 1 MLJ 317 and *M & J Frozen Food Sdn Bhd v Siland Sdn Bhd & Anor* [1994] 1 MLJ 294 distinguished.

G **[Bahasa Malaysia summary**

Perayu telah merayu supaya perintah penjualan tanah yang dipegang di bawah Geran 13138, Lot No 6891 Mukim Kelang ('tanah tersebut') — melalui cara lelong awam — kepada responden diketepikan. Perayu juga memohon supaya perintah penolong kanan pendaftar membenarkan perlanjutan masa kepada responden selama H 90 hari untuk membayar baki harga belian tanah tersebut diketepikan. Ia adalah ditegaskan bahawa perayu tidak dihubungi mengenai permohonan responden untuk melanjutkan masa.

Diputuskan, menolak rayuan tersebut:

I Perayu telah dihubungi atau sedar mengenai prosiding-prosiding untuk penjualan tanah tersebut. Perayu juga tahu mengenai terma-terma syarat-syarat penjualan tersebut. Oleh itu perlanjutan masa

selama 90 hari untuk membayar baki harga belian telah diberikan menurut terma-terma fasal 6 syarat-syarat jualan tersebut. Tidak terdapat pemindaan atau perubahan kepada syarat-syarat penjualan, oleh itu kegagalan responden untuk memberikan notis deraf permohonan tersebut untuk melanjutkan masa bukanlah memudaratkan kepada penjualan tersebut (lihat ms 174F–H, 176C); *Malayan United Finance, Johore Bahru v Liew Yet Lan* [1990] 1 MLJ 317 dan *M & J Frozen Food Sdn Bhd v Siland Sdn Bhd & Anor* [1994] 1 MLJ 294 dibeza.]

Notes

For cases on sale of land by auction generally, see 8 *Mallal's Digest* (4th Ed, 1999 Reissue) paras 2855–2869.

Cases referred to

Development and Commercial Bank Bhd, Johore Bahru v Kim Ming Choon [1991] 2 MLJ 246 (refd)

M & J Frozen Food Sdn Bhd v Siland Sdn Bhd & Anor [1994] 1 MLJ 294 (distd)

Malayan United Finance Bhd, Johore Bahru v Liew Yet Lan [1990] 1 MLJ 317 (distd)

Legislation referred to

National Land Code 1965 ss 256, 258(1)

Appeal from: Code No 24–316 of 1990 (High Court, Shah Alam)

George Proctor (*YS Woo & Proctor*) for the appellant.
Thangaraj s/o Balasundram (*Thangaraj & Associates*) for the respondents.

Zakaria Yatim FCJ (delivering judgment of the court): The appellant, Chi Liung Holdings Sdn Bhd ('Chi Liung') filed an application in the High Court for an order that the sale of its land held under Grant 13138, Lot No 6891, Mukim of Kelang to L & T Realty Sdn Bhd ('L & T Realty') be set aside. Chi Liung also applied that the order of the senior assistant registrar granting L & T Realty an extension of time of 90 days to pay the balance of the purchase price of the said land in the sum of RM1,953,000 be set aside. Ranita Hussein JC dismissed the application with costs.

On 27 April 1995, Chi Liung appealed to this court. This court, by an unanimous decision, dismissed the appeal with costs.

On 7 August 1995, Chi Liung filed an application for leave to appeal to the Federal Court. By an order dated 7 August 1995, the Federal Court granted the leave. The Federal Court also ordered that L & T Realty '... disekat daripada memperolehi milikan kosong bagi harta tanah di bawah No Geran 13138 No Lot 6891 dalam Mukim Kelang ...' pending the disposal of the appeal.

On 18 August 1995, Chi Liung's solicitors wrote a letter requesting for grounds of judgment. Copies of the letter were sent to the other members of the panel which heard the appeal. Neither party communicated to this court since that letter was written. Suddenly, on 29 April 1999, Messrs Thangaraj & Associates, solicitors of L & T Realty wrote a letter to my secretary requesting for my grounds of judgment. The two other members of the panel had already retired.

I am, therefore, writing my own grounds of judgment as requested by Messrs Thangaraj & Associates.

The facts of the case are that Chi Liung was the owner of the said land. It obtained a loan from Public Finance Bhd ('Public Finance') and charged the said land to the latter. Chi Liung defaulted in paying the loan and Public Finance obtained an order for the sale of the said land by public auction.

The sale took place on 5 July 1994. The successful bidder was L & T Realty, who paid a deposit of RM217,000. According to the terms and conditions of the sale, the balance price of RMl,953,000 was to be paid within 90 days, that is, before 4 October 1994. Before the expiry of that date, L & T Realty's solicitors wrote a letter on 22 September 1994 to the senior assistant registrar, High Court, Shah Alam applying for extension of time for another 90 days to pay the balance price. The senior assistant registrar granted the extension in his own handwriting on 10 October, 1994. Consequently L & T Realty paid the balance price on 9 December 1994.

In its affidavit in support of the application to set aside the order for extension of time, Chi Liung stated that it was never notified that L & T Realty applied for extension of time. It contended that the order granting the extension of time was ultra vires the National Land Code. It also stated that the court had no jurisdiction to grant an extension of time.

At the hearing of the Appeal before this court, the only issue raised by Chi Liung's counsel, Mr Grorge Proctor, was whether the senior assistant registrar was right in granting L & T Realty an extension of time for another 90 days to pay the balance price of the said land. He referred to s 258(1) of the National Land Code 1965 which states that where an order for sale had been made, it was the duty of the registrar of the court to serve a copy of the order on the chargor. He said that his client was not aware of any extension of time. He argued that since his client was not told about the extension of time, the senior assistant registrar should not have made the order. He then asked this court to cancel the sale of the said land and order a new auction to be held. In support of his argument, Mr Proctor cited *M & J Frozen Food Sdn Bhd & Anor v Siland Sdn Bhd & Anor* [1994] 1 MLJ 294; *Malayan United Finance Bhd Johore Bahru v Liew Yet Lan* [1990] 1 MLJ 317; and *Development and Commercial Bank Bhd, Johore Bahru v Kim Ming Choon* [1991] 2 MLJ 246.

Mr Thangaraj, counsel for L & T Realty, submitted that under cl 6 of the conditions of sale, the registrar had the power to grant an extension of time. He distinguished *Malayan United Finance* and *M & J Frozen Food* from the present case. He said that in *Malayan United Finance*, there was no

provision for extension of time in the conditions of the sale. In *M & J Frozen Food*, there was a variation of the terms of the conditions of the sale. A

Before dealing with the issue of the extension of time, it is relevant to refer to the earlier orders of the court regarding this matter after Chi Liung had defaulted in paying its loan to Public Finance. By an originating summons dated 3 September 1990 Public Finance had applied to the High Court in Shah Alam for the sale of the said land by public auction under s 256 of the National Land Code 1965. On 21 April 1993, Mahadev Shanker J (as he then was), after hearing the submissions of both counsel for Public Finance and for Chi Liung made an order that the said land 'dijual secara pelelongan awam di bawah arahan mahkamah ini selaras dengan s 256 Kanun Tanah Negara 1965 untuk pembayaran jumlah sebanyak RM5,329,397.33 setakat 21 April 1993 dengan faedah dalam itu pada kadar 12.75% setahun kiraan bulanan mulai 22 April 1993 hingga ke tarikh penyelesaian.' The order also stated that the sale was to take place on 6 September 1993. B C

On 26 April 1993, Public Finance filed a summons for direction in the High Court Shah Alam. A copy of the summons was addressed to Chi Liung. On 30 June 1993 the senior assistant registrar made an order. According to the order Chi Liung's counsel did not appear at the hearing of the summons of direction. On 19 April 1994, the senior assistant registrar made another order stating that the new date for the auction was 5 July 1994. The Public Auction duly took place on 5 July 1994. D E

It is clear that the application before Mahadev Shanker J, was duly served on Chi Liung because the order of the learned judge expressly mentioned that Chi Liung's counsel made his submission before the learned judge. The summons for direction was addressed to Chi Liung but according to the order of the senior assistant registrar dated 30 June 1993, only counsel from Public Finance was present at the hearing. The subsequent order of the senior assistant registrar dated 19 April 1996 mentioned that the solicitor for Chi Liung was absent. F

In my opinion, Chi Liung was duly informed or aware of the proceedings for the sale of the said property. Chi Liung was also aware that the date of auction as 5 July 1994. In para 3 of its affidavit affirmed on 24 November 1994, it stated that 'The plaintiff had obtained an order for the sale of the said property and on 5 July 1994 the said property came up for auction.' I find that the proceedings up to the date of auction had complied with s 256 of the National Land Code. G

I shall now discuss the issue appropos the extension of time of 90 days to pay the balance price. H

The public auction was advertised in the local newspapers fourteen days before the date of sale. After the public auction, Chi Liung knew who was the successful bidder at the public auction. In its affidavit affirmed on 24 November 1994, it stated that the auction price was RM2,170,000 and that a deposit of RM217,000 was paid by the successful bidder. The affidavit also exhibited a copy of the Proclamation of Sale together with the conditions of sale. In my view Chi Liung know the terms of the conditions I

of sale. Indeed, the learned judicial commissioner had stated in her grounds of judgment, that it was not in dispute that Chi Liung was aware of the terms of the conditions of sale.

In its affidavit dated 24 November 1994, Chi Liung did not challenge the validity of condition 6 of the conditions of sale. It merely stated that the extension of time for 90 days was ultra vires the National Land Code. Condition 6 states:

> The balance of the purchase money shall be paid in by the purchaser within ninety (90) days from the date of the sale to the senior assistant registrar, High Court, Shah Alam by bank draft. If the purchaser fails to comply with this condition, the deposit shall be forfeited to the plaintiff unless an agreement to extend the time is obtained from the plaintiff. Upon getting the consent to forward it to the senior assistant registrar for approval.

Clause 6 expressly allowed the purchaser (L & T Realty) to extend the time to pay the balance of the purchase price provided that the vendor (Public Finance) agreed to it. Once there was such an agreement, the matter could be forwarded to the senior assistant registrar for approval.

As already stated, L & T Realty, wrote to the senior assistant registrar on 22 September 1994 for the extension of time. In that letter L & T Realty mentioned that Public Finance had no objection to the extension of time. By a letter dated 15 September 1994, Public Finance stated that it agreed to allow L & T Realty an extension of time of 90 days to pay the balance of the purchase price. The senior assistant registrar gave his approval on 10 October 1994.

In my opinion, the extension of time for 90 days to pay the balance price was granted in accordance with the terms of cl 6. There was no variation of the conditions of sale.

In *Malayan United Finance*, condition 7 of the conditions of sale provided that the purchaser had to pay the balance of the purchase money within 30 days from the date of the sale and 'time shall be the essence' of the sale contract. In his judgment in that case VC George J (as he then was) said at p 319:

> In my judgment in the face of condition 7, particularly with the expressly emphasized provision thereto that time shall be the essence of the contract, and in the face of condition 19, the learned senior assistant registrar had no jurisdiction to entertain the application to extend the time for completion without the consent of the chargee.

In *Siland Sdn Bhd v M & J Frozen Food Sdn Bhd* [1990] 2 MLJ 502, the sale of the charged land was done by public auction. Richard Talalla JC decided that the purchaser was not entitled to an extension of time. The learned judicial commissioner (as he then was) said at p 503:

> Under cl 7 of the special conditions, *Frozen Food* was obliged to pay the balance of the purchase money into court ... within 30 days of the date of the sale ... and in this respect time was of the essence of the contract. *Frozen Food* failed to do so.

Frozen Food appealed to the Supreme Court. The Supreme Court dismissed the appeal. In delivering the judgment of the Supreme Court, Wan Yahya SCJ said at pp 310–311:

> In our present appeal, the effects of extending the time of payment is to cause a material change in the condition of sale and thus render it no longer in accordance with or within the terms of the original order ... Consequently, the amended conditions of sale bearing some different terms or directions from the original conditions has to be served again in accordance with s 258(1)(a) of the National Land Code on the chargor. Failure to do so is a clear transgression of the statutory provisions of that section.

It is clear that the situations in *Malayan United Finance* and *M & J Frozen* are different from the present case. In those two cases, time was of the essence of the contract. This was not so in the present case. Here, there was a strict adherence of condition 6. There was no alteration or variation of condition 6. I agree with Ranita Hussein JC, that failure to give the draft notice of the application to extend time is not fatal to the sale.

For the reasons stated above, I dismissed the appeal with costs.

Appeal dismissed

Reported by Wong Siok Chin